JIMMIE L. SANDERS
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-42-A Decided February 12, 1991

Appeal from a decision denying assistance under the Housing Improvement Program.

Vacated; referred to the Assistant Secretary - Indian Affairs.

1. Administrative Procedure: Hearings--Hearings--Indians: Generally

The Board of Indian Appeals will not refer a case for an evidentiary hearing pursuant to 43 CFR 4.337(a) when the resolution of the factual disputes is not necessary for disposition of the case.

2. Bureau of Indian Affairs--Administrative Appeals: Discretionary Decisions--Indians: Housing: Housing Improvement Program

The Board of Indian Appeals will refer to the Assistant Secretary - Indian Affairs an appeal requiring a decision as to whether to waive regulations set forth in 25 CFR 256.5(b), limiting certain categories of assistance under the Housing Improvement Program.

APPEARANCES: Jimmie L. Sanders, pro se; Janet L. Spaulding, Esq., Office of the Regional Solicitor, Southwest Region, U.S. Department of the Interior, Tulsa, Oklahoma, for the Muskogee Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Jimmie L. Sanders seeks review of an October 5, 1989, decision of the Muskogee Area Director, Bureau of Indian Affairs (BIA; Area Director), denying his application for housing assistance under the Housing Improvement Program (HIP). For the reasons discussed below, the Board of Indian Appeals (Board) vacates that decision and refers this matter to the Assistant Secretary - Indian Affairs for further consideration in accordance with this opinion.

Background

Appellant is a Creek Indian residing on 9 acres of former reservation lands of the Muskogee Creek Nation in Cromwell, Seminole County, Oklahoma.

In 1980, appellant applied for and received HIP assistance in the amount of $4,350 to make repairs to his house in Cromwell.

Appellant's house was destroyed by fire in December 1986. Appellant visited the Wewoka Agency, BIA, on February 10, 1987, seeking assistance in replacing his house. A note in the administrative record shows that agency personnel had been informed in January 1987 that the Housing Authority of the Creek Nation (housing authority) had funds to build Mutual-Help houses under a program run by the Department of Housing and Urban Development. The note states that agency personnel attempted unsuccessfully that day to contact the director of the housing authority on appellant's behalf, informed appellant they would try to contact the housing authority again the next day, and encouraged him to apply for assistance under this program. The note indicates that appellant stated he was not interested in applying to the housing authority because of a discussion he had with them approximately 3 years earlier. There is no evidence in the record that agency personnel inquired into the substance of the conversation appellant had with the housing authority.

Appellant states that in March and April 1987 he spoke with two banks and the Farmers Home Administration concerning home loans, and was denied by each institution. Appellant states that he spoke with the "Creek Nation HIP" concerning financing the purchase of a mobile home, and was informed, without citation of any authority, that BIA no longer bought mobile homes, added onto them, or purchased houses to be moved onto an applicant's land. In April 1987 appellant obtained a bank loan for a mobile home, apparently using his land as collateral.

On August 24, 1987, appellant formally applied to BIA for HIP assistance. Appellant's application states that his family was residing in a two-bedroom trailer. A November 13, 1987, memorandum to the Wewoka Agency Superintendent requested that a waiver of the regulations in 25 CFR 256.5(b) 1/ be sought so that appellant could receive "assistance through the H.I.P. program for materials to build a new home in which he will furnish the labor." A handwritten note on the bottom of that memorandum states that appellant was told, apparently at a later time, that if a waiver of the regulations could be obtained, HIP funding could probably be used to construct a permanent foundation for the mobile home and to add one bedroom. The note concludes: "His response was taken as, if that's the best they can do, I guess that will be okay!"

1/ Section 256.5(b) provides: "After July 1, 1975, an applicant can receive assistance one time under categories given in paragraphs (b), (c), and (d) of § 256.4." Section 256.4 sets forth four categories of assistance under HIP: Category A (§ 256.4(a)) relates to repairs to housing that will remain substandard even after the repairs; Category B (§ 256.4(b)) relates to repairs to housing that is deteriorated but will be standard after repairs; Category C (§ 256.4(c)) relates to down payments for standard housing; and Category D (§ 256.4 (d)) relates to the construction of new standard housing.

There is no evidence in the record that BIA requested a waiver of the regulations in response to appellant's 1987 application. The next document in the record is a February 26, 1988, letter from appellant's Senator, inquiring into the status of appellant's request for HIP assistance. An internal memorandum dated March 2, 1988, indicates that BIA contacted the director of the housing authority on appellant's behalf and was informed that the housing authority could work appellant into its program because of the emergency nature of his situation. It is not clear whether this contact was made in February 1987, when appellant first contacted BIA seeking assistance; in February or March 1988, when the memorandum was written; or at some other time. The memorandum further indicates that appellant was informed of this offer, but declined it. The memorandum concludes that because appellant declined this offer of assistance, he was not eligible to receive HIP assistance under 25 CFR 256.5. 2/ The Area Director's March 4, 1988, response to the Senator stated at page 2 that the construction of a foundation and additional bedroom had been offered to appellant if a waiver could be obtained, and that he "acknowledged this offer of assistance."

When appellant received no further information from BIA, on April 7, 1988, he obtained a $16,000 loan from the Seminole County Indian Credit Association. He used this loan to begin construction of a new house on his land in Cromwell. The exterior of the house was apparently completed, but the loan proceeds were not adequate to allow appellant to complete the interior, including finishing of the kitchen, bathroom, and electrical system.

On December 16, 1988, appellant filed a written request for waiver of 25 CFR 256.5(b) so that he could obtain HIP assistance to complete the construction of the new house. On February 16, 1989, appellant filed an amended HIP application. An April 11, 1989, estimate done for BIA indicates that completion of the work on appellant's house would cost $17,500. 3/

On July 13, 1989, the Area Director submitted a request to the Assistant Secretary - Indian Affairs for a waiver of 25 CFR 256.5(b). The request states:

> On September 18, 1980, [appellant] was granted $4,350 Category B assistance. The house that was repaired with this grant burned in December 1986. [Appellant] then acquired a manufactured house in April 1987.
>
> [Appellant] applied for HIP assistance in September 1987. He requested a Category D new house. We investigated his situation and found the manufactured house [appellant] occupied was

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2/ Section 256.5(a) provides in pertinent part: "Applications * * * must establish that: * * * (3) The economic resources of the applicant are inadequate or factors exist which make the applicant unable to secure housing from other sources."

3/ Appellant states that this estimate, the only one obtained by BIA, is inflated.

a modern standard unit with the exception of not having a permanent foundation and one bedroom being too small. We offered to construct a permanent foundation and add a standard 120 square foot bedroom to the existing structure. [Appellant] refused our assistance.

[Appellant] borrowed $16,000 from the Seminole County Indian Credit Association on April 7, 1988, to construct a 1,400 square foot house. He has completed the foundation, rough utilities, and all exterior work but does not have sufficient funding to complete the interior. The remaining work includes plumbing, bathroom and kitchen fixtures, wiring, electrical fixtures and controls, interior wall and ceiling gypboard and trim, interior door and window trim, floor covering, floor leveling, cabinet work, painting, furnace and duct work, and hot water tank and piping. The estimated cost of this remaining work is $17,500.

[Appellant] fully meets the eligibility requirements except for the second-time assistance criteria. He has completed approximately fifty percent of construction with the funds borrowed from the Seminole County Indian Credit Association and has no other source of funding or assistance to complete the house.

[Appellant] has shown initiative in housing his family without asking for our assistance. He is now asking that the HIP grant him $17,500 for Category B repairs to complete his house. I feel this situation warrants our waiving the regulations to assist [appellant].

While this request was pending, on August 3, 1989, the Wewoka Agency Housing Improvement Program Selection Committee met and recommended disapproval of appellant's application for HIP assistance. 4/ The committee stated four reasons for disapproval: (1) appellant had previously received HIP assistance; (2) appellant was offered HIP assistance with an addition and a foundation for the trailer in 1987; (3) the Creek Nation offered assistance which appellant refused; and (4) the Wewoka Credit Department loaned money for appellant to build a new house in 1988. 5/

4/ Section 256.5(a) further provides that "[e]ach application for assistance must be approved by the tribal housing authority or other officially designated housing entity of the tribe being served." Apparently, the committee in this case, consisting of one representative from the Seminole Nation, one from the Seminole Nation Housing Authority, and one from the Indian Health Service, performs this function in an advisory capacity.

5/ It appears possible that the referenced offer of assistance from the Creek Nation relates to the housing authority, and the Wewoka Credit Department loan relates to the loan from the Seminole County Indian Credit Association. The record of the committee's action does not disclose the source or nature of the information upon which it based its decision.

After receiving the committee's recommendation, on October 5, 1989, the Area Director denied appellant's February 16, 1989, amended application, stating:

> Our records indicate you received a Category B Housing Improvement Program repair grant in September 1980. According to HIP regulations, 25 CFR 256.5(b), after July 1, 1975, an applicant can only receive assistance one time under this category. The Housing regulations prohibit second-time assistance without a waiver being granted by the Assistant Secretary - Indian Affairs, Department of the Interior.
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> You contacted the Bureau of Indian Affairs, Wewoka Agency, in February 1987, asking for housing assistance. Based on your desire to obtain new housing, the Creek Nation Housing Authority was contacted in your behalf. In our discussion with the Creek Nation Housing Authority, it was learned they offered to build you a new Mutual-Help house. You refused the Creek Nation Housing Authority assistance. You stated you were not interested in the Mutual-Help Housing Program. The Mutual-Help Housing Program is funded by the Department of Housing and Urban Development and is one of the primary sources for building new Indian homes.
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> In February 1987 [sic], you were living in a mobile home that was fairly modern and in good condition. It appeared to be substandard housing by virtue of one bedroom being too small. We offered to construct a permanent foundation and add a bedroom to the existing unit under our rehabilitation program if a waiver of regulation for second-time assistance was approved. You refused our offer of assistance.
>
> The Seminole County Indian Credit Association records show you borrowed $16,000 in April 1988, to construct a new house. To be eligible for HIP assistance, our regulations, 25 CFR 256.5(a)(3), state that the economic resources of the applicant should be inadequate or factors exist which make the applicant unable to secure housing assistance from other sources. The loan from the Seminole County Indian Credit Association indicates you can secure housing from other sources. Our housing assistance program is structured to assist needy Indians who cannot find other financial sources to obtain housing.

There is no indication in the record as to whether the Area Director withdrew his July 13, 1989, request for waiver.

Appellant filed an appeal from this decision with the Board. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

The first part of appellant's brief is devoted to his initial receipt of HIP assistance in 1980. Appellant alleges: (1) the assistance received

in 1980 should have been Category A rather than Category B; and (2) BIA was overcharged for repairs done to his house in 1980, so that the actual amount spent on his repairs minus the overcharges and some funds that were allegedly returned to BIA did not exceed $2,500.

It appears likely that appellant believes that the only reason his 1980 application was approved as Category B, rather than Category A, was because the amount approved exceeded $2,500. Appellant's approved 1980 HIP application, included as Exhibit C to his brief, states that funds under Category A are not to exceed a cumulative total of $2,500. The form also shows that appellant received a Category B grant and states "CFR limits assistance to applicant under these categories [B, C, and D] to one time only." (Emphasis in original.) It further appears that based on this belief, appellant contends that because the amount that was or should have been spent on the repairs was actually less than $2,500, his grant should now be determined to have been made under Category A. This change would make him eligible for a second grant without the necessity of obtaining a waiver of the "one-time only" regulatory limitation which applies to Category B grants.

Initially, the time for appealing these issues expired in 1980. Under 25 CFR 2.10 (1981), a notice of appeal had to be "received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant." If appellant disputed the 1980 determination, he should have raised this question at that time. Any allegation that BIA was overcharged for the repairs made in 1980, or that the repairs were not properly completed, should also have been raised when the repairs were made.

However, even if the Board were to reach these issues, it would not change the category designation of appellant's 1980 grant. The amount of the grant is not the only difference between Categories A and B. Category A grants apply to "existing substandard housing so that it is safe, more sanitary and livable until such time as standard housing is available." 25 CFR 256.4(a)(1). The dollar limitation is imposed because the repairs to such housing are intended only to be a temporary measure. In distinction, Category B grants apply to "existing structurally sound but deteriorated dwellings which can economically be placed into a standard condition." 25 CFR 256.4(b)(1). The classification of appellant's 1980 grant under Category B evidences BIA's determination that appellant's house was, or as a result of the repairs would be, standard housing. Appellant has not argued that this determination was incorrect. Accordingly, the Board would not disturb BIA's determination in this matter merely because of the amount of money that was or allegedly should have been spent to effect the repairs.

Concerning the denial of his 1987/1989 application, appellant first contends that the application should not have been denied because of his receipt of HIP funds in 1980. This issue has just been addressed. Appellant received Category B assistance in 1980 and was, therefore, eligible to receive further HIP assistance only if a waiver of the regulations was granted.

The reminder of appellant's arguments concern whether he was in fact approved for assistance or refused offered assistance, as stated in the HIP committee's and the Area Director's decisions. The Board has carefully reviewed appellant's submissions, the administrative record, and the Area Director's denial letter. Based upon this examination, it holds that the administrative record does not support the Area Director's decision.

Appellant disputes that he was ever informed of any assistance offered by the housing authority, and states that any assistance offered by BIA was always qualified by the need to obtain a waiver of the regulations. He denies that he ever refused an unqualified offer of assistance. He indicates that other HIP applicants in Seminole County were sent to the Seminole Nation Housing Authority to obtain a perfunctory denial, and notes that the Seminole Nation had not constructed a new house since 1979. Based upon the fact that he lived in Seminole County, appellant states that he believed he should contact the Seminole Nation Housing Authority rather than the Creek Nation Housing Authority. He states that if he had contacted the Seminole Nation Housing Authority, he would have been denied. Finally, he contends that he borrowed funds from the Seminole County Indian Credit Association only after he had exhausted all other means of assistance and that the Association took a big chance in granting him a loan because they believed in him. Nonetheless, he states that the loan he obtained was not sufficient to complete construction of a house, and he is unable to borrow more money.

[1] It is obvious that there are numerous factual disputes in this case. Most significantly, although BIA's evidence is written and appellant's is verbal, the question of whether appellant was ever offered assistance, which he refused, essentially resolves into one person's word against another's. Under such circumstances, the Board has authority to require an evidentiary hearing. 43 CFR 4.337(a). In this case, however, the Board finds that resolution of the factual questions is not required for disposition of this case. See, e.g., Washoe Tribe of Nevada and California v. Acting Phoenix Area Director, 19 IBIA 190, 194 (1991).

In reviewing the administrative record in this case, the Board has noted numerous discrepancies, unexplained allegations, and various other problems. Because it finds that at least two of these problems require that the Area Director's decision be vacated, the Board will address only those two problems in this discussion.

First, the record, as maintained by BIA, indicates that BIA personnel "assured" appellant in February 1987 that they would submit a request for waiver of 25 CFR 256.5(b) on his behalf. See Administrative Record, Tab 6. Although BIA stated that appellant was informed that a waiver was not guaranteed, the request itself was apparently not qualified. In fact, despite BIA's assurance in February 1987, appellant's August 1987 and February 1989 HIP applications, the February 1988 Congressional inquiry into the status of appellant's application, the many discussions between appellant and BIA personnel, and appellant's own December 1988 written request for a waiver, no waiver request was submitted until July 1989.

There is no reasonable way in which BIA could have "misunderstood" that appellant was interested in applying for HIP assistance or that a waiver of the regulations was a necessary prerequisite for him to be eligible for such assistance. Both the HIP committee and the Area Director, however, listed prior receipt of HIP assistance as the initial reason for denying further assistance. Under the circumstances of this case, the Board holds that the fact that appellant had not been granted a waiver of 25 CFR 256.5(b) cannot be used to deny his HIP application. The circumstances requiring this holding are that, by its own evidence, BIA assured appellant that it would request a waiver, failed to make that request for more than 2 years, and then at least in effect withdrew the request by denying appellant's application before the waiver request had been acted upon. Appellant's not being granted a waiver obviously affected the entire decision making process in this case. Because BIA bore the responsibility to request a waiver once it had represented that it would do so, the Area Director's decision must be vacated.

Even more egregious are the contradictions between BIA's July 1989 request for waiver and its October 1989 denial of appellant's HIP application. The only point of similarity between these two documents is that both state appellant needs a waiver of 25 CFR 256.5(b). Otherwise, the documents are totally inconsistent. The July request for waiver states that, except for the "one-time only" limitation, appellant "fully meets the eligibility criteria." The October denial letter finds that he is ineligible for four reasons. The reasons given in October for denying appellant assistance were cited in July as examples of his "initiative." According to the record, the only change in appellant's circumstances between the writing of the two documents was the HIP committee's recommendation. 6/ Both of the documents cannot be correct. The Area Director's failure to reconcile or explain the differences between these two documents also requires that his denial be vacated.

[2] Based upon an examination of the administrative record in this case and pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1 and 4.337(b), the October 5, 1989, decision of the Muskogee Area Director is vacated. This case is referred to the Assistant Secretary - Indian Affairs for a decision as to whether the "one-time only" limitation in 25 CFR 256.5(b) should be waived for appellant under his present circumstances. This is a case where appellant's circumstances have changed since his original application; while he now has part of a house, he is also deeply in debt. These changes resulted, at least in part, from BIA's delays in acting on appellant's application.

6/ The HIP committee's recommendation of disapproval of appellant's application was obviously based upon information provided by BIA, because none of the committee members are shown by the administrative record to have been involved personally in prior dealings with appellant. Its deliberations, therefore, have the same deficiencies as does the Area Director's decision.

Since appellant appears to be still in need of assistance, it is appropriate, given the history of this case, to require that appellant's application be considered as if he had filed it on the date of this opinion. For instance, in considering whether appellant is capable of obtaining financing elsewhere, only his present financial situation, not the fact that he was earlier able to borrow money, should be weighed. Similarly, the possibility that appellant may have turned down other offers of assistance in the past should not be considered. In short, appellant's application is to be reviewed solely against his situation as of the date of this opinion. In light of the age of this case, the Assistant Secretary - Indian Affairs is requested to expedite his review and decision in this matter.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge